

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In The Matter of)

Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 1995)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 95-3

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its comments on the revised Schedule of Regulatory Fees proposed in the Notice of Proposed Rule Making, FCC 95-14 ("NPRM") issued by the Commission on January 12, 1995 in the captioned proceeding. TRA opposes the expansion and redefinition of the fees applicable to interexchange carriers ("IXCs") proposed in the NPRM (at ¶¶54-59). In TRA's view, imposition of regulatory fees on entities reselling interexchange services is contrary to Congressional intent and sound public policy. In the event, however, that the Commission expands its Schedule of Regulatory Fees to encompass resale carriers, TRA urges it to calculate regulatory fees for IXCs on the basis of "Customer Units."

I.

INTRODUCTION

TRA is an association created to foster and promote the interests of entities engaged in the resale of domestic interexchange and international telecommunications

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services. Employing the transmission, and often the switching, capabilities of underlying facilities-based network providers, the resale carriers comprising TRA create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to long distance rates otherwise available only to much larger users. TRA resale carrier members also offer small and mid-sized commercial and residential customers enhanced, value-added products and services and personalized customer support functions which are generally not provided to low volume users. Indeed, many TRA resale carrier members are full service providers of seamlessly integrated communications solutions, providing small and mid-sized businesses with a wide array of integrated voice and data telecommunications services, as well as sophisticated customer-oriented billing.

TRA's members – more than 300 resale carriers and their underlying service and product suppliers – range from emerging, high-growth companies to well-established, publicly-traded corporations. They represent the fastest growing sector of the long distance industry. The resale community is already populated by more than 1,000 carriers, currently serves hundreds of thousands of customers, representing more than ten billion minutes of long distance traffic, and generates annual revenues in the billions of dollars. Moreover, the telecommunications resale industry is forecast to double in size by the end of the century.

As mandated by Section 6002(a) of the Omnibus Budget Reconciliation Act of 1993,^{1/} the Commission last year adopted rules to implement newly-enacted Section 9 of

^{1/} Pub. L. No. 103-66, Title VI, §6002(a), 107 Stat. 397 (approved Aug. 10, 1993) ("1993 Budget Act").

the Communications Act of 1934, as amended, 47 U.S.C. §159, providing therein for the annual assessment and collection of regulatory fees.^{2/} Among other things, the Commission identified the entities upon whom regulatory fees would be assessed, prescribed the amounts of such fees and the rules for the payment thereof. In setting fees and establishing the "multipliers" by which such fees would be calculated, the Commission implemented the Schedule of Regulatory Fees precisely as set forth in the 1993 Budget Act. Thus, with respect to IXCs, the Commission imposed the fee of \$60 per 1,000 presubscribed access lines specified in the 1993 Budget Act.

In the instant proceeding, the Commission is proposing to revise the Schedule of Regulatory Fees adopted in the 1994 Fee Order. Among the revisions proposed in the NPRM are the "Mandatory Adjustments" necessitated by the Section 9(b)(2) directive that the Commission recover an amount equal to the amount appropriated by Congress for Commission enforcement, policy and rulemaking and international activities and user information services for Fiscal Year 1995 ("FY 1995"). The NPRM, however, is also proposing certain other revisions to the current Schedule of Regulatory Fees pursuant to Section 9(b)(3). Included among these purportedly "Permitted Amendments" are proposals to expand the Schedule of Regulatory Fees to encompass resale providers of interexchange services and consistent with this expansion, to revise the manner in which fees imposed on IXCs are calculated. With respect to the latter matter, the NPRM identifies two alternative "multipliers:" (i) "Customer Units" — i.e., the number of billing accounts less those accounts already associated with presubscribed lines reported by the

^{2/} Implementation of Section 9 of the Communications Act, 9 FCC Rod 5333 (1994) ("1994 Fee Order").

carrier, and (ii) minutes of interstate service, including a combination of originating and terminating access minutes, billed minutes and estimated billed minutes.

For the reasons set forth below, TRA urges the Commission to retain the current "multiplier" for IXCs and, consistent with the 1994 Fee Order, to decline to expand the Schedule of Regulatory Fees to encompass resale providers of interexchange services. As noted above, in TRA's view, imposition of regulatory fees on entities reselling interexchange services is contrary to Congressional intent and sound public policy. If, however, the Commission elects to apply to resale carriers the regulatory fees it imposes on IXCs, TRA urges it to adopt "Customer Units" as the associated "multiplier."

II.

ARGUMENT

A. Expanding The Schedule Of Regulatory Fees To Encompass Resale Providers Of Interexchange Services Would Be Inconsistent With Congressional Directives.

When Congress established the Schedule of Regulatory Fees in the 1993 Budget Act, it expressly identified "presubscribed lines" as the "multiplier" for calculating IXC fees. As the Commission has recognized, "switchless" resellers are prevented, for technical reasons, from ordering customers' long distance service directly from local exchange carriers ("LECs"); indeed they must order such services from their network providers.^{3/} As a result, "switchless" resellers generally do not have access lines presubscribed to them. Unless one is to assume that the Congress did not understand or appreciate the import of its designation of presubscribed lines as the "multiplier" for IXC

^{3/} Policies and Rules Concerning Changing Long Distance Carriers, 8 FCC Rcd 3215, ¶20 (1993).

regulatory fees, it would appear that the Congress did not intend to include resale carriers among the entities upon whom such fees were to be assessed.

Certainly, the Commission may not simply ignore the will of Congress because it believes that its actions are otherwise justified. As the United States Court of Appeals for the District of Columbia Circuit recently admonished, the Commission is "still bound to the text Congress enacted."^{4/} And as the United States Supreme Court recently reminded it, the Commission's "estimations of desirable policy cannot alter the meaning of the Federal Communications Act of 1934."^{5/} Finally, it is a cardinal rule of statutory construction that full effect is to be given to every clause and word of a statute so that no clause, sentence or word will be rendered superfluous, void or of no significance.^{6/}

Expanding regulatory fees to reach interexchange resale carriers thus appears to be inconsistent with directives embodied in the 1993 Budget Act.^{7/} If Congress' identification of presubscribed lines as the "multiplier" for computing IXC fees has any meaning, it shows a Congressional view that fees are not properly imposed on resellers.

^{4/} Southwestern Bell Corp. v. F.C.C., No. 93-1562 (January 20, 1995).

^{5/} MCI Telecommunications Corp. v. American Tel. and Tel. Corp., 114 S.Ct. 2223 (1994).

^{6/} See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5631, ¶61 (1993); C. Sands Sutherland, Statutory Construction, §46.06; United States v Menasche, 348 U.S. 528, 538-39 (1955).

^{7/} It should be borne in mind that Section 9 of the Communications Act only authorizes the Commission to amend the Schedule of Regulatory Fees by adding, delete or reclassifying services in the Schedule to "reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law." Since the Schedule of Regulatory Fees was first adopted, there have been no changes in the Commission's services as they relate to the resale of interexchange services. Rather, the Commission has simply decided that it would be appropriate to impose regulatory fees on resale providers of interexchange services.

B. Expanding the Schedule of Regulatory Fees to Encompass Resale Providers of Interexchange Services Would Not Constitute Sound Public Policy.

As the Commission has recently reaffirmed, resale of interexchange telecommunications services generates "numerous public benefits," chief among which are the downward pressure resale exerts on long distance rates and charges and the enhancements resale produces in the diversity and quality of long distance service offerings.^{8/} The lower prices and service enhancements that resale generates redound primarily to the benefit of lower volume users. As described earlier, TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial and residential customers enhanced, value-added products and services and personalized customer support functions which are generally not provided to low volume users. Indeed, many TRA resale carrier members are full service providers of seamlessly integrated communications solutions, providing small and mid-sized businesses with a wide array of integrated voice and data services, as well as sophisticated customer-oriented billing.

To obtain and preserve these public benefits for consumers, the Commission long ago adopted, and continues to enforce, policies which require that "all common

^{8/} AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359, ¶12 (January 4, 1995) (citing Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261 (1976) ("Resale and Shared Use Order"), recon. 62 F.C.C.2d 588 (1977), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), recon. 86 F.C.C.2d 820 (1981)) ("AT&T Forfeiture Order").

carriers . . . permit unlimited resale of their services.^{9/} To this end, the Commission affirmatively deems unjust and unreasonable and prohibits restrictions on resale.^{10/} Indeed, the Commission has recently declared that "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect."^{11/}

The Commission's resale policies have produced their intended effect. As set forth earlier, the resale community is today the fastest growing sector of the long distance industry. The "switchless" resale industry is populated by more than 1,000 carriers, serves hundreds of thousands of telecommunications customers, representing more than ten billion minutes of long distance traffic, and generates annual revenues in the billions of dollars. Moreover, the percentage of the long distance market currently represented by "switchless" resale is forecast to double by the end of the century.

Against this backdrop, TRA submits that the proposed expansion of the Schedule of Regulatory Fees to encompass resale providers of interexchange services does not constitute sound public policy. Any imposition of regulatory fees on resale carriers would represent double, triple or greater recovery of such assessments. Whatever "multiplier" is used to calculate IXC fees, such fees will be paid by facilities-based IXCs on all interexchange carriage, including traffic transported for resale carriers. Any fees paid by resale carriers thus will be associated with interexchange carriage for which fees have already been imposed. And given that larger resale carriers often

^{9/} AT&T Forfeiture Order, FCC 94-359 at ¶2.

^{10/} Resale and Shared Use Order, 60 F.C.C.2d at 298-99.

^{11/} AT&T Forfeiture Order, FCC 94-359 at ¶13.

provide "wholesale" services to smaller resellers, fees may be paid again and again on the same interexchange carriage.^{12/}

This redundant recovery will have a "multiplied" adverse effect on resale carriers and the consuming public. Facilities-based network providers will likely incorporate regulatory fees into their charges and pass them through to resale carriers. If regulatory fees were to be imposed on resale carriers and they could incorporate such fees into their rates, resellers would likewise pass these fees through to customers. In the event that multiple levels of resale were involved, three or more regulatory fees could ultimately be incorporated into end-user charges. The more likely scenario, however, is that market forces would prevent resale carriers from incorporating regulatory fees into their charges and as a result, their net revenues would be reduced. Given that second, third or fourth tier resellers could pay fees indirectly two, three or more times, the reduction in net revenues could be far higher than the amount of the fees imposed directly on them.

Given that most resale carriers are small to mid-sized businesses, any regulation which would adversely impact profitability would have a more direct and immediate impact on them than on the much larger facilities-based network providers. At a time when the nation is looking to small business to create jobs and stimulate economic growth and the Commission is looking to resale carriers to drive costs lower and enhance service

^{12/} Other complicating factors would also be present. Some resellers still act primarily as "aggregators." In an "aggregated" service, the underlying facilities-based carrier not only renders the bill to the end-user, but the end-user submits payment to that carrier. The reseller is compensated in the form of credits received from the underlying facilities-based carrier. It is unclear whether resellers who participate in such "aggregated" programs would be subject to regulatory fees. And further complicating this matter, multiple levels of resellers can participate in the same "aggregated" programs as "wholesalers" and "retailers."

diversity and quality, TRA submits that the Commission would be ill-advised to handicap such entities with redundant regulatory fees. A fee scheme which disproportionately burdens the resale market and customers of resale carriers certainly would not further these aims. A sounder approach would seemingly be to directly recover all statutorily-mandated amounts from facilities-based carriers, with resale carriers indirectly contributing their share through payment of charges incorporating these fees. Such an approach – embodied in the current Schedule of Regulatory Fees – would avoid the discriminatory and counter-productive impact inherent in the NPRM-proposed revisions.

C. In The Event That The Commission Elects To Levy Regulatory Fees Directly On Resale Providers Of Interexchange Services, It Should Adopt "Customer Accounts" as the "Multiplier."

In the event that the Commission elects to expand its Schedule of Regulatory Fees to encompass interexchange resale carriers, TRA urges the Commission to calculate the fees that would be imposed on IXC's on the basis of "Customer Units." As articulated by the NPRM, "Customer Units" would be the greater of (i) the number of presubscribed lines and (ii) the number of billing accounts less those accounts already associated with presubscribed lines reported by the carrier. This "multiplier" has several key advantages. First, it is similar to the "multiplier" adopted by the Congress in the 1993 Budget Act – i.e., presubscribed lines. Second, it provides certainty in most instances for both the FCC and the carriers;^{13/} the necessary data can be easily and accurately measured and audited. Third, it is not unduly burdensome; the information is readily available to the carrier and already available, at least in part, to the Commission. Finally,

^{13/} As noted above, resellers of "aggregated" products pose a separate complication.

it is consistent with other programs administered by the Commission. For example, Universal Service Fund and Lifeline Assistance assessments are calculated on the basis of presubscribed lines.^{14/}

III.

CONCLUSION

By reason of the foregoing, TRA urges the Commission to decline to expand the Schedule of Regulatory Fees to encompass resale providers of interexchange service and to retain the current "multiplier" for determining the regulatory fees that are imposed on IXCs. In the event, however, that the Commission elects to levy regulatory fees directly on resale IXCs, it should adopt "Customer Units" as the "multiplier."

Respectfully submitted,

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^{14/} See Section 69.116 and 69.117 of the Commission's Rules, 47 C.F.R. §§69.116 & 69.117.